Supreme Court U.S.
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In the United States Supreme Court

WILLIAM COHEN,
Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA
Defendant-Appellee

Docket No. _____
October 1998 Term

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit
11th Circuit Docket No. 97-8737

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a statutory right of action for negligence based on a federal enactment–18 USC 4042– recognized in *United States v Muniz*, 374 US 150; 83 S Ct 1850; 10 L Ed 2d 805 (1963) on behalf of a federal prisoner assaulted by another prisoner improperly classified to the same correctional institution and security level is negated–thus leaving federal prisoners with no legally enforceable right of protection by the Bureau of Prisons against bodily harm while in federal custody other than that found in the Eighth Amendment prohibition against cruel and unusual punishment–by the discretionary function exception to the Federal Tort Claims Act, despite decisions in other circuits, *Brown v United States*, 486 F2d 284, 288 (CA 8, 1973); *Jones v United States*, 91 F3d 623 (CA 3, 1996); *Payton v United States*, 679 F2d 475, 482 (CA 5, 1982)(*en banc*), and *Flechsig v United States*, 991 F2d 300, 303-304 (CA 6, 1993) rejecting that notion and contradicting the Eleventh Circuit's decision, and notwithstanding the principle established in *FDIC v Meyer*, 510 US 471, 114 S Ct 996, 127 L Ed 2d 308 (1994), that the discretionary function exception has no application to rights based on federal law?

2. Whether Plaintiff is entitled to recover damages, without regard to the FTCA, based on a theory of constitutional tort, where plaintiff's pleadings were filed *in propria persona* and therefore, however "inartfully pleaded," are entitled to be broadly construed, *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976); *Haines v Kerner*, 404 US 519, 520-521; 92 S Ct 594; 30 L Ed 2d 652, so as to embrace not only an FTCA theory but a constitutional tort theory, establishing an alternate and independent basis for affirming the judgment of the District Court pursuant to *Owens v Haas*, 601 F2d 1242, 1249 (CA 2, 1979), cert den 444 US 980; 100 S Ct 483; 62 L Ed 2d 407, and *Carlson v Green*, 446 US 14, 19; 100 S Ct 1468; 64 L Ed 2d 15 (1980)?

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List of All Parties in the Eleventh Circuit

William Cohen, Plaintiff
Neal G. Gale, plaintiff's trial counsel (based on a contingency fee claim)

United States of America, Defendant

THERE ARE NO PARENT COMPANIES OR NON-WHOLLY OWNED SUBSIDIARIES TO BE DISCLOSED PURSUANT TO RULE 29.6; THERE ARE NO CORPORATIONS INVOLVED IN THIS MATTER .

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Citations of the Official and Unofficial Reports of the Opinions and Orders Entered in This Case by Lower Courts

Cohen v United States, 151 F3d 1338, 12 Fla L Weekly F C3 (CA 11, 1998)

THERE IS NO OFFICIAL OR UNOFFICIAL CITATION FOR THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION.

[Copies of the District Court's Findings of Fact, Judgment, and Interlocutory Decisions on pertinent motions are found in Appendices 1-4]

Jurisdictional Statement

William Cohen, *in propria persona* as well as *inops consilii*, after his administrative claim (timely filed on January 12, 1994) was rejected, filed this lawsuit in the United States District Court, Southern District of Georgia (Brunswick Division) on December 29, 1994[1]. The administrative claim was presented pursuant to 28 USC §2672[2] and the jurisdiction of the District Court was invoked under 28 USC §1346(b)(1), which grants the district courts exclusive jurisdiction of civil actions on claims against the United States for money damages or personal injury caused by the omission, negligence, or wrongful act of any employee of the federal Government while acting within the scope of office or employment.

After trial to the bench, during which Cohen was represented by counsel, judgment was entered by the United States District Court, Southern District of Georgia (Brunswick Division) on May 16, 1997. The United States had 60 days from that date, or until July 15, 1997, in which to file its notice of appeal. FRAP 4(a)(1). The United States Court of Appeals for the Eleventh Circuit's jurisdiction over the government's appeal was accordingly vested by the timely filing of a Notice of Appeal on July 11, 1997.

Jurisdiction of the Eleventh Circuit over the cross-appeal was vested by virtue of the filing, again *pro se*, of Plaintiff William Cohen's Notice of Appeal on July 23, 1997 (by Federal Express overnight service, FRAP 25(a) and 11th Cir. IOP 25.1), less than 14 days after the filing of the original Notice of Appeal by the United States on July 11, 1997. FRAP 4(a)(3). Thereafter, present counsel appeared for Cohen and briefed and argued the case before the Eleventh Circuit.

The Eleventh Circuit reversed the judgment of the District Court, holding that the discretionary function exception to the Federal Tort Claims Act insulates the Government from liability, thus not reaching issues raised

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[1] In its District Court pleadings, the Government acknowledged that service of process was made on the Attorney General on January 9, 1995, and on the United States Attorney on January 19, 1995.

[2] Mr. Cohen, suing for injuries sustained while incarcerated under the jurisdiction of the Attorney General (Bureau of Prisons), by virtue of having been liberated prior to filing the lawsuit, was not additionally subject to the requirement of 42 USC §1997e(a) to exhaust administrative remedies, although the filing of his administrative claim nonetheless had the effect of satisfying that statutory requirement if applicable.

in Cohen's cross-appeal, by opinion released August 26, 1998. *Cohen v United States*, 151 F3d 1338; 12 Fla L Weekly Fed C 3 (CA 11, 1998). Cohen timely moved for rehearing, FRAP 40(a), and 11th Cir.R. 40-2, and rehearing en banc (by virtue of 11th Cir. R. 35-6, a suggestion of rehearing en banc is automatically "treated as a petition for rehearing before the original panel"), but rehearing was denied by order of November 20, 1998.

This petition for certiorari is accordingly timely if filed on or before February 18, 1999 (90 days after November 20, 1998). Supreme Court Rule 13.1 and 13.3. The jurisdiction of the Supreme Court is invoked on the authority of 28 USC §1254(1).

Full Text of Constitutional Provisions and Statutes Involved in the Present Case

Constitutional Provisions:

U. S. Constitution, Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutes:
(in numerical order by Title and Section)

18 USC §3521:

> (a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.
>
> (2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of

the authority of the Attorney General contained in paragraph (1) would be appropriate.
(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

18 USC §3621(b):

(a) The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;
(2) the nature and circumstances of the offense;
(3) the history and characteristics of the prisoner;
(4) any statement by the court that imposed the sentence—
    (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
    (B) recommending a type of penal or correctional facility as appropriate; and
(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 USC §4041:

The Bureau of Prisons shall be in charge of a director appointed by and serving directly under the Attorney General at a salary of $10,000 a year. The Attorney General may appoint such additional officers and employees as he deems necessary.

18 USC §4042(2):

The Bureau of Prisons, under the direction of the Attorney General, shall—

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise; (3) . . .

18 USC §4081:

The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

28 USC §501:

The Department of Justice is an executive department of the United States at the seat of Government.

28 USC §503:

The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.

28 USC §1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 USC §1346(b)(1):

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and

the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USC §2671:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 USC §2672:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the

Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee. Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned

out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 USC §2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee

of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 USC §2679(a):

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

28 USC §2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

42 USC §1997e(a):

(a) No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative

remedies as are available are exhausted.

Kansas Stat. Ann. 75-6104(e):

> A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:
>
> . . .
>
> (e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved; . . .

STATEMENT OF THE CASE

Nature of the Case Generally

William Cohen's *pro* se complaint in the United States District Court for the Southern District of Georgia, Brunswick Division, was in terms predicated on, and invoked the jurisdiction of the District Court pursuant to, the Federal Tort Claims Act, 28 USC §1346(b)(1) and §§2671 *et seq.*, based upon negligence and involving personal injuries., and also sounded directly under the Constitution. On February 8, 1992, William Cohen, a federal prisoner serving the final days of an 18 month sentence for copyright violations, was severely injured when attacked by another inmate incarcerated in the same part of the Jesup Federal Correctional Institution ("Jesup FCI"), the Community Corrections Center ("CCC"), a portion of the FCI carrying the lowest security classification within the federal correctional system, security [or custody] level "one out". Cohen's theory of liability was that the Federal Bureau of Prisons ("BOP") was negligent, and violated its statutory obligation under 18 USC §4042 to protect him (or correlatively his statutory right to be protected) during his incarceration.

Cohen asserted in his complaint, and proved at trial, that the government was negligent in assigning the perpetrator of the assault, Humberto Garcia, who had a long history of violence *inter alia*, to an FCI rated to house prisoners classified at "security level one out" ("SL-1 Out"). The government initially sought summary judgment under FRCivP 56 for lack of proof of negligence, but in the face of the overwhelming evidence of negligence at trial practically abandoned any pretense of having acted with due care (although keeping up appearances with *pro forma* argument to the contrary), and rested mainly on its contention that the all aspects of the prisoner classification process are within the FTCA's "discretionary function" exception, 28 USC §2680(a).

Two motions for dismissal, FRCivP 12, based on the discretionary function exception or some variation on the theme, were rejected by the trial judge, and the factual underpinnings of the defense were again found wanting after trial to the bench. The government was found liable by the trial judge as trier of fact, with no comparative negligence on the part of Mr. Cohen. Mr. Cohen was awarded $250,000 for pain and suffering. In its written findings, the

trial court pinned its monetary award on the physical pain and suffering, making no award for medical care and expenses or loss of consortium. The trial court also refused to award any economic damages for loss of past and future income to Mr. Cohen, a 62 year old in excellent health prior to the injury, and with a life expectancy, as found by the trial court, of 17 years, most or all of which, based on family history, might have been spent in gainful employment but for his injuries. Those damages issues were the subject of the cross-appeal by plaintiff Cohen, which were never adjudicated by the Eleventh Circuit.

Summary of Proofs and Findings

Following his conviction for copyright act violations, William Cohen, a 60 year old businessman from Flint, Michigan, was sentenced to 18 months incarceration by the Federal District Court for the Eastern District of Michigan, which sentence he began serving in February, 1991 following affirmance of his conviction by the Sixth Circuit[1] (in a 2-1 decision). Based on Mr. Cohen's lack of any prior criminal record, his age, his slight physical stature, the nature of his crime, and the length of his sentence, Mr. Cohen was assigned by the Attorney General to the Community Corrections Center ("CCC"), a facility within the larger Jesup Federal Correctional Institution. The CCC at Jesup FCI is a "Community custody level one out" institution, the lowest classification for security purposes within the federal correctional system, designed for the offenders presenting the least threat to the public and to one another.

The CCC at Jesup is a housing unit, consisting of two dormitories with a combined capacity for 500 prisoners quartered in cubicles not wholly dissimilar from some modern office arrangements (of the type often seen in the Dilbert© comic strip)[2], and featuring cafeteria style dining. These twin dormitories are managed and supervised by only two personnel working for the

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[1] *United States v Cohen*, 946 F2d 430 (CA 6, 1991).

[2] 37' X 10', bunk bed, wardrobe, desk, an opening with no door, a cork board for photos and notes.

Bureau of Prisons[3], reflecting the minimal oversight that "Community custody level one out" prisoners require. Prisoners are generally released during the day for work assignments within other units of Jesup or in nearby municipalities. During free time, prisoners may watch television in the community activities rooms provided for that purpose.

During Mr. Cohen's incarceration at Jesup, Humberto Garcia, a resident alien[4] originally from Cuba, was also assigned to the CCC to serve a 5 to 40 year sentence[5] for possession with intent to distribute more than 500 grams of cocaine (21 USC §841(a); 18 USC §2)—the actual amount exceeded 3 kilograms with 92% purity, equivalent to 2776 grams of 100% pure cocaine (6+ pounds)[6]. Before Garcia eventually pled guilty to that offense, the US Attorney for the Southern District of Florida sought to revoke Garcia's bond on an emergency basis for having threatened the government's confidential informant[7].

Mr. Garcia had a long criminal record beginning at age 18, with convictions for carrying a concealed firearm (2 counts), possession of cocaine, and resisting arrest, and numerous arrests for violent offenses including attempted murder, aggravated assault

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[3]So stipulated by the Government prior to trial.

[4]At trial, there was some dispute over Mr. Garcia's citizenship status. One unverified document indicated Garcia may have acquired U.S. citizenship when his mother was naturalized, but the Presentence Report (Appendix 9, p. 11, ¶#40)—the only document the accuracy of which was a product of a formal judicial hearing process in which Garcia actually had both motive and opportunity to correct any errors at sentencing, *United States v Kelly*, 687 F2d 1217, 1220 (CA 8, 1982) (yet the Presentence Report (Appendix 9, p. 17, Addendum), shows that Garcia, through counsel, objected only to a historical detail as to how he purchased his private motor vehicle)—not only asserted flatly that Garcia is an alien, but listed his INS alien registration number (A11643153).

[5]So indicated on all the sentencing records and by stipulation, but at trial it was claimed that such indeterminate sentences are no longer meted out under the federal sentencing guidelines, and that Garcia was actually sentenced to 63 months.

[6]Presentence Report (Appendix 9, pp. 2, ¶ #1).

[7]Presentence Report (Appendix 9, pp. 3-4, ¶#6).

(multiple occasions), and aggravated assault on a police officer, as well as burglary, carrying a concealed weapon, dealing in stolen property, obstruction of justice, obstruction by false information, possession of a machine gun, grand larceny, possession of a firearm with altered serial number, possession of cocaine, possession of qualuudes, possession of marijuana, and possession of narcotic equipment, and several for resisting arrest[8]. The presentence report on Garcia indicated he had assaulted one of his sisters (for which she filed no charges) shortly before his arrest on the cocaine charge[9]. Immediately after being arrested for the firearm violation, in the presence of the arresting officer, Garcia threatened to kill one of the witnesses by hiring a Colombian assassin[10]. Garcia, at the time of his assignment to Jesup FCI, was a relatively "virile" (in the words of the District Court's Judge [Appendix 1, p. 3, Finding #15]) young man (D.O.B. October 2, 1958) of solid physique, reflecting his training as a weightlifter. He dropped out of high school during the 10th grade, at which time he had a "D" scholastic average[11]. His record of violence was, according to the findings of the District Court, ignored by the BOP, in violation of the administrative prisoner classification guidelines (Appendix 1, p. 6, Findings ##32-33), in classifying him to Community custody level one out status. (Appendix 1, p. 5, Findings ##25-29). The District Court further found, expressly, that "Garcia's record demonstrates that he was a violent person . . ." (Appendix 1, p. 5, Finding #27) who, had the BOP followed its own guidelines, would have been assigned to a higher security level institution. (Appendix 1, p. 6, Finding #32).

On February 8, 1992, just four months before Mr. Cohen was scheduled to be released, while some prisoners were watching television, Garcia switched the channel. Mr. Cohen noted that the rules of the institution required a certain channel to be selected during that time frame, and returned the channel selector to that

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[8]Presentence Report (Appendix 9, pp. 6-10, ¶¶##19-38).

[9]Presentence Report (Appendix 9, p. 11, ¶#41).

[10]Presentence Report (Appendix 9, pp. 6-7, ¶#20).

[11]Presentence Report (Appendix 9, p. 12, ¶#45.

position. Nothing was said further by Mr. Garcia. (Appendix 1, p. 2, Findings ##5-7). The other prisoners one by one drifted out of the room and back to their cubicles. (Appendix 1, p. 2, Finding #8). Without warning, Garcia picked up a metal folding chair and attacked Mr. Cohen from behind, smashing him over the head repeatedly. (Mr. Cohen has no recollection of the attack; Mr. Garcia not surprisingly denied responsibility. However, the circumstantial evidence was so overwhelming[12] that, by the time of trial, the government effectively conceded the manner in which Mr. Cohen came to be so grievously injured)[13]. (Appendix 1, Finding #9).

Mr. Cohen was found alone, lying on the floor of the community activities room, unconscious and bleeding. (Appendix 1, Finding #10). After being rushed to a hospital, Mr. Cohen underwent neurological surgery to reduce a subdural hematoma, which was secondary to a basilar skull fracture bilaterally. (Appendix 1, Findings ##12-13). Surgery was followed by three weeks of hospitalization (Appendix 1, Finding #13) and then weeks of physical therapy and recuperation. Although Mr. Cohen has regained imperfect ambulation and most of his former intellectual function and long term memory, he suffers from permanent short term memory problems and has completely lost his sense of taste and smell. Mr. Cohen cannot mentally concentrate, suffers from vertigo and severe headaches, and is totally and permanently disabled. (Appendix 1, Finding #14).

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[12]Neither the Tooth Fairy nor the Easter Bunny came forward to acknowledge culpability in the assault, and it seemed improbable that Mr. Cohen had beaten himself over the back of the head with a chair, so the district judge had no trouble deducing that Garcia, the only other person known to be present, must be the perpetrator. The Bureau of Prisons, however, discreditably more intent on covering its administrative posterior and protecting the careers of civil servants than in sanctioning Mr. Garcia for his thuggery, could not bring itself to charge Mr. Garcia either criminally with assault with a deadly weapon or administratively with misconduct, asserting "lack of evidence." Like most attempted government coverups, this one was, at least until the Eleventh Circuit's decision, inefficacious; the district court was certainly not fooled.

[13]The facts in this paragraph were the subject of pretrial admissions or a stipulation at the commencement of trial, with the inference that Garcia perpetrated the actual assault left formalistically to the trier of fact, who duly reached that conclusion. (Trial transcript pp. 7-16).

After the prerequisite filing of a timely administrative claim which was rejected in due course, Mr. Cohen, proceeding *in pro per*, filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 USC §§1346(b) and 2671 *et seq*. and the Constitution of the United States, asserting that the government was negligent in assigning a prisoner with Humberto Garcia's personal history to a "Community custody level one out" FCI, in violation of the BOP's statutory duty to both safekeep prisoners under its jurisdiction and to protect those prisoners during their incarceration. 18 USC §4042; *United States v Muniz*, 374 US 150, 164-165 n. 26, 83 S Ct 1850, 10 L Ed 2d 805 (1963). The government filed two motions for dismissal based on the "discretionary function exception" to liability under the FTCA, 28 USC §2680(a), each of which was denied[14].

Following a bench trial before Hon. Anthony Alaimo in the United States District Court for the Southern District of Georgia, Brunswick Division, the government was found to be negligent and Mr. Cohen was awarded $250,000 in non-economic damages (pain and suffering), but zero dollars in economic damages. Judge Alaimo specifically found that the civil servant who classified Mr. Garcia as "Community custody level one out" had no discretion of the type

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[14]One reason, among others developed *infra*, why the discretionary function exception is inapposite is that the cited statute obviously creates a mandatory protective obligation on the part of the Government, acting through the Attorney General and Bureau of Prisons, which duty is intended to be facilitated through the various Program Statements which establish in detail the prisoner classification process. The District Court found that these administrative norms were not followed in assigning Humberto Garcia to the CCC at Jesup FCI. Such violations of administrative regulations preclude a finding that the government's actions are sheltered by the discretionary function exception. *United States v Gaubert*, 499 US 315, 322, 111 S Ct 1267, 1276, 113 L Ed 2d 335 (1991); *Phillips v United States*, 956 F2d 1071, 1076 (CA 11, 1992); *Kennewick Irrigation Dist v United States*, 880 F2d 1018, 1026-1027 (CA 9, 1989); *US Fidelity & Guaranty Co v United States*, 837 F2d 116, 120 (CA 3, 1988), *cert den* 487 US 1235, 108 S Ct 2902, 101 L Ed 2d 935. Thus, when as to Humberto Garcia the designator failed to factor into the classification decision elements which the administrative regulations required be taken into account, and correlatively gave great or preclusive weight to elements to which the regulations assigned little or no weight, she stood the regulations on their head and, by violating them, removed the injurious effects of her misconduct from the protective ambit of the discretionary function cocoon, even assuming *arguendo* the classification process otherwise constitutes a discretionary function.

relevant to immunizing the government under the "discretionary function" exception of the FTCA, and further concluded that this bureaucrat had in any event failed to follow the requisite administrative protocols by classifying Mr. Garcia without proper attention to the relevant historical factors and without obtaining pertinent factual information concerning Mr. Garcia (or by ignoring the relevant information).

On direct appeal, however, the Eleventh Circuit reversed, asserting that the District Court's finding of fact as to the failure of the BOP to follow its own guidelines for classifying prisoners was clearly erroneous, and that the discretionary function exception applies. In so holding, the Eleventh Circuit rejected prior contrary decisions of the former Fifth Circuit and of other Circuits as well. The Eleventh Circuit declined to address in any way Cohen's alternative argument that the judgment of the District Court could and should be upheld on the basis of a direct constitutional claim (or the matter remanded to the District Court for any necessary further findings as to such issues) which is well within the scope of the pleadings.

ARGUMENT

1. A statutory right of action for negligence based on a federal enactment--18 USC §4042–which the United States Supreme Court recognized in *United States v Muniz*, 374 US 150; 83 S Ct 1850; 10 L Ed 2d 805 (1963) on behalf of a federal prisoner assaulted by another prisoner improperly classified to the same correctional institution and security level is NOT negated so as to leave federal prisoners with no legally enforceable right of protection by the Bureau of Prisons against bodily harm while in federal custody–by the discretionary function exception to the Federal Tort Claims Act, as correctly recognized by decisions in other circuits, *Brown v United States*, 486 F2d 284, 288 (CA 8, 1973); *Cline v Herman*, 601 F2d 374, 375-376 (CA 8, 1979); *Flechsig v United States*, 991 F2d 300, 303-304 (CA 6, 1993) contradicting the Eleventh Circuit decision, and, independently, in accordance with the principle established in *FDIC v Meyer*, 510 US 471, 114 S Ct 996, 127 L Ed 2d 308 (1994), that the discretionary function exception has no application to rights based on federal law.

A. The Eleventh Circuit's decision misapplies the discretionary function exception.

The Eleventh Circuit reasoned that "our conclusion in this [case] is mandated by our holding in *Ochran v United States*, 117 F3d 495 (CA 11, 1997)"–a case not cited by either party. *Ochran*, however, is inapposite–which explains why neither party relied upon it–but that decision actually lends support, by virtue of its distinguishing salient features, to plaintiff Cohen's position, *if correctly understood*.

In *Ochran*, suit was brought by a federal witness, who charged that an Assistant US Attorney failed to protect her from a suspected offender who threatened her life. The present *Cohen* Eleventh Circuit opined that the statute at issue in *Ochran* (18 USC §3521) is similar to 18 USC §4042, the principal statutory basis for Cohen's claim against the BOP. To the contrary, however, the statute on which the plaintiff in *Ochran* relied both *expressly* imposes only discretionary duties on the Attorney

General[15], *and* expressly precludes judicial recognition of any actionable duty[16].

In contrast, 18 USC §4042 uses mandatory, not permissive language ("shall", not "may"), and lacks any directory proviso akin to 18 USC §3521(a)(3)'s express declaration that the cause of action normally implied by the principles of *Cort v Ash*, 422 US 66, 78, 95 S Ct 2080, 45 L Ed 2d 26 (1975) not be recognized.

Indeed, not only was it error to rely on *Ochran*, but the Sixth Circuit has correctly recognized that, irrespective of the applicability of the FTCA, since 18 USC §4042 establishes a duty of protection running from the BOP to a prisoner in its custody, *United States v Muniz*, 374 US 150; 83 S Ct 1850; 10 L Ed 2d 805 (1963), the discretionary function exception is inapposite to a federal tort action, based on the principle established in *FDIC v Meyer*, 510 US 471, 114 S Ct 996, 127 L Ed 2d 308 (1994). The Sixth Circuit reasoned:

> "Thus, *Meyer* prescribed that, because Congress merely decreed in 28 USC §2679(a) that the FTCA will supply the sole remedy for state law tort claims against the United States generated by wrongs committed by such agencies, the FTCA does not preclude the assertion of tort lawsuits supported by substantive federal law against federal government instrumentalities which have been congressionally invested with the power to sue and be sued[17] in their own names."

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[15] *E.g.*, "The Attorney General *may* provide for the relocation and other protection of a witness . . ." 18 USC §3521(a)(1); ". . . the Attorney General shall take such action *as the Attorney General determines to be necessary* to protect the person . . . The Attorney General *may*, by regulation . . ." 18 USC §3521(b)(1); ". . . the Attorney General *may* provide temporary protection to such person . . ." 18 USC §3521(e); "The Attorney General *may* terminate the protection provided under this chapter . . ." 18 USC §3521(f).

[16] ("The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter."). 18 USC §3521(3).

[17] The Department of Justice, an executive department of the United States, 28 USC §501, headed by the Attorney General, 28 USC §503, who in turn is also the

Federal Express Corp v US Postal Service, 151 F3d 536 (1998).

In accord with this principle as applied in the context of the liability of a correctional institution for failure to safekeep prisoners by exercising reasonable care to protect them from assaults by other prisoners is the decision in *CJW by and through LW v State*, 253 Kan 1, 8-15; 853 P2d 4, 7-14 (1993). There, the Kansas Supreme Court rejected governmental reliance on the discretionary function exception to the Kansas Tort Claims Act, *identical in terms to the Federal Tort Claims Act's* discretionary function exception, Kansas Stat. Ann. §75-6104(e). The Kansas court reasoned identically, *viz.*, that where a duty is imposed by law,[18] there is no discretion to omit to fulfill that duty, and thus the discretionary function exception does not shield the government from liability in situations, where, by virtue of either prior specific threats or the offending prisoner's history of violence and predisposition thereto, the assault is foreseeable, all of which that court held to be a question of fact, not of law. Here, the District Court found as fact—in findings unchallenged by the Government on appeal—that the BOP failed to exercise due care in classifying

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administrative head of the BOP, 18 USC §4041, similarly, by virtue of its inherent function of both suing in the name of the United States and defending suits against the United States, the AG/DoJ/BOP has(have) the power to sue and be sued. As the Court correctly reasoned in *United States v Rock Island Centennial Bridge Comm'n*, 230 F Supp 654, 655 (SD Ill, ND, 1964):

> "I hold that the court has jurisdiction of the cause. If the enabling act adopted by Congress imposes restrictions upon the purposes for which bridge tolls may be charged, either one or two results must emanate from the fact that the act itself makes no express provision for enforcement of its provisions. Either the act is not subject to enforcement, or the Attorney General as chief counsel for the United States, has authority to file a suit in the name of the United States to enforce the statute. To me the first alternative is untenable. Congress had the power to legislate. There is no contention here that that power was lacking, and it is inconceivable to me that the exercise of that power could be flouted without any hope of redress."

[18] In that case, the duty was imposed by the common law, Restatement of Torts 2d §§319-320, which principles are equivalent to 28 USC §4042.

Humberto Garcia, and that this negligence proximately caused William Cohen's injuries and damages.

Yet the Eleventh Circuit opinion effectively nullifies 18 USC §4042, since a statutory right of prisoners to be safely kept is meaningless if there is no means of enforcement. To the contrary, when the Attorney General violates a statute, the AG (in the juridical *persona* of the BOP) is liable to suit unless some immunity *external* to the FTCA applies. *Federal Express Corp v US Postal Service, supra; Halperin v Kissinger*, 196 US App DC 285, 606 F2d 1192 (1979), affirmed in part, cert dismissed in part 452 US 713, 101 S Ct 3132, 69 L Ed 2d 367. Here, the Attorney General, according to the findings of the trier of fact, violated the duty imposed by 18 USC §4042 to safely keep prisoner Cohen. This violation of a *federal* statute is actionable under *FDIC v Meyer, supra*, without regard to the discretionary function exception, which applies only to rights based on *state* law.

Accordingly, the Eleventh Circuit opinion is in conflict with the Supreme Court's decision in *FDIC v Meyer, supra* and additionally creates an inter-circuit conflict with *Federal Express v US Postal Service, supra*.

B. **The Eleventh Circuit opinion misconstrues and misapplies 18 USC §3621 so as to negate 18 USC 4042.**

In deeming that 18 USC §4042 imposes no actionable duty, the Eleventh Circuit asserts that any duty of safekeeping of prisoners which might arise is vitiated by 18 USC §3621, which gives the BOP complete discretion to designate "any available penal or correctional facility that meets minimum standards of health and habitability" as the place of a prisoner's imprisonment. Respectfully, this reading of two statutes which are clearly *in pari materia* is untenable. As the Sixth Circuit said in *Federal Express v US Postal Service, supra*, "It would be strange if Congress had resolved to give with one hand and then take away with the other." *Accord: Brunette Machine Works v Kockum Indus*, 406 US 706, 710 n. 8; 92 S Ct 1936; 32 L Ed 2d 428 (1972). 18 USC §4042 establishes a duty of safekeeping, while 18 USC §3621 allows the use of any available correctional facility *consistent with the duty of safekeeping separately established. Things Remembered, Inc v Petrarca*, 516 US 124; 116 S Ct 494; 133 L Ed 2d 461 (1995)

quoting *Thermtron Products, Inc v Hermansdorfer*, 423 US 336, 345-346; 96 S Ct 584; 46 L Ed 2d 542 (1976).

18 USC §3621 principally addresses matters of geography, *Persico v Gunnell*, 560 F Supp 1128 (SD NY, 1983); federal prisoners thus cannot claim any right to be incarcerated near their homes and families. Construing 18 USC §3621 as negating the duty of safekeeping created by 18 USC §4042 violates cardinal rules of statutory construction. *Connecticut Nat Bank v Germain*, 503 US 249, 253; 112 S Ct 1146; 117 L Ed 2d 391 (1992); *United States v United Continental Tuna Corp*, 425 US 164, 168; 96 S Ct 1319; 47 L Ed 2d 653 (1976). The Eleventh Circuit opinion effectively holds that by virtue of 18 USC §3621 Congress took away the protections established in 18 USC §4042, which flouts still another principle of statutory construction. *Brunette Machine Works v Kockum Indus, supra*, 406 US at 710 n. 8. Note that Garcia could have been geographically assigned to the same location but at a different security level (FCI Jesup borders a walled federal correctional enclave featuring Security Levels 1-"IN" through 4), so there was no practical impediment to fulfilling both statutory mandates.

Moreover, the very existence of such statutory rights implies the existence of all necessary and appropriate remedies for their vindication. *Sullivan v Little Hunting Park, Inc*, 396 US 229, 239; 90 S Ct 229; 24 L Ed 2d 386 (1969); *Texas & Pac R Co v Rigsby*, 241 US 33, 39; 36 S Ct 482; 60 L Ed 874 (1916) ("A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . ."). It was on just this basis that *Muniz* recognized 18 USC §4042 as providing the basis for a federal cause of action. The Eleventh Circuit opinion has imported sovereign immunity back into a statute designed to limit it, *Indian Towing Co v United States*, 350 US 61, 69; 76 S Ct 122; 100 L Ed 61 (1955), and also purported to transmogrify the discretion accorded clerical personnel in classifying prisoners into the type of social, economic, or regulatory policy for which the discretionary function was intended and to which it is limited in application, *United States v Gaubert*, 499 US 315, 325 n. 7; 111 S Ct 1267; 113 L Ed 2d 335 (1991).

C. **The Eleventh Circuit opinion misunderstands *Calderon v United States*, 123 F3d 947 (CA 7, 1997).**

Calderon, which the Eleventh Circuit also found persuasive, is readily distinguishable from the present case. In *Calderon*, no claim was made that the offending prisoner should not have been classified or placed at the same institution with the plaintiff (Calderon); rather, the claim there was that the BOP neglected to protect Calderon from foreseeable attack by fellow inmate Perez. The Seventh Circuit not only found no statute mandating such protection, but an administrative *regulation*[19] expressly declaring that it would be up to BOP staff discretion whether and what steps, if any, to take in such situations.

In the present case, in contrast, there is a statute mandating that the BOP classify inmates appropriately, and no regulation suggesting discretion to be negligent in doing so–as repeatedly noted by both plaintiff Cohen and the United States, the Program Statement does not have the status of a duly adopted and promulgated regulation, but is merely a description of how the BOP conducts its internal operations[20]. Elevating the Program Statement to the level of a formal regulation which defeases plaintiff Cohen of his statutory right to be kept safely while in the custody of the BOP both exceeds any justification to be found in *Calderon* and is inconsistent with the principles of *Cort v Ash*, *Federal Express Corp v US Postal Service*, and *FDIC v Meyer*, *supra*.

D. The Eleventh Circuit opinion ignores cited precedent from other circuits and creates an inter-circuit split.

The Eleventh Circuit opinion completely ignores three cases duly cited by plaintiff Cohen and never distinguished or even addressed by the government, *Brown v United States*, 486 F2d

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[19] In contrast to the Program Statement, which has no such formal legal status.

[20] The Program Statement, so much the focus of attention by the Government and of decision by the Eleventh Circuit, is merely a description of the BOP's internal operating procedures, and has no legal status as a regulation. *Flechsig v United States*, *supra*, 991 F2d at 304. *A fortiori*, it can hardly insulate the Government from civil liability for breaching a statutory duty recognized by this Court in *Muniz*, *supra*.

284, 288 (CA 8, 1973), *Jones v United States*, 91 F3d 623, 624-625 (CA 3, 1996), and *Flechsig v United States*, 991 F2d 300, 303-304 (CA 6, 1993), as well as *Cline v Herman*, 601 F2d 374, 375-376 (CA 8, 1979). In *Brown* and *Cline*, the Eighth Circuit recognized the federal government is answerable in damages under the FTCA for the simple negligence of BOP personnel in failing to protect federal prisoners. In *Jones*, the Third Circuit recognized that 18 USC §4042 establishes an actionable duty of care which that Court deemed "unambiguous," while in *Flechsig* the Sixth Circuit recognized that 18 USC §4042 sets forth a legal duty on which a viable negligence action may be predicated (although holding that the prisoner in that case failed to come forward with any evidence of negligence). *Brown*, exactly like the case at bar, involved a claim that the BOP was negligent in assigning the offending prisoner to the same institution as the plaintiff prisoner; neither *Calderon* nor any other case relied upon by the Eleventh Circuit or the government involves such a theory of liability. The Eleventh Circuit opinion thus creates an inter-circuit split.

Highlighting this inter-Circuit split of authority, *Flechsig* was followed and applied in a factual context similar to that of the case at bar even *after* publication of the Eleventh's Circuit's present *Cohen* decision. *Jackson v United States*, 24 F Supp 2d 823, 830-831 (WD Tenn, 1998), the district court there rejecting application of the discretionary function exception to the actions of lower level BOP personnel. Thus, federal prisoners in the States comprising the Third, Fifth, Sixth, and Eighth Circuits are owed a duty of reasonable care by the BOP, but federal prisoners in the territory assigned to the Eleventh Circuit are unprotected except by the Eighth Amendment. Such an inter-circuit disparity in enforceable rights and protections under a single statute violates the equal protection component of the due process clause of the Fifth Amendment. *Bolling v Sharpe*, 347 US 497, 499, 74 S Ct 693, 98 L Ed 884 (1954).

E. The District Court's finding of fact–that the officials who classified and assigned Humberto Garcia to Jesup FCI did not exercise policy judgment–was never challenged by the government and was therefore binding on the Eleventh Circuit.

For the discretionary function exception to be invoked by the government, the officials who made a decision which is the subject of suit must have exercised policy judgment. Whether an official decision represents a policy judgment of the type protected by the discretionary function exception is a question of fact, *Berkovitz v United States*, 486 US 531, 545; 108 S Ct 1954; 100 L Ed 2d 531 (1988). The government on appeal never argued that the District Court's finding of fact, after trial, that BOP designators—the federal employees who actually classified Humberto Garcia to security level one-out status—did not exercise policy judgment, is clearly erroneous, and this unchallenged finding should have controlled the matter on appeal[21]. *Jackson v United States*, *supra*, 24 F Supp 2d at 831.

That no policy judgment was involved is also readily seen even if the issue were a matter of law. The Policy Statement is not an administrative regulation, but merely a statement of BOP internal operating procedure, and it does not have the force of law. *Flechsig v United States, supra*, 991 F2d at 304; *Chrysler Corp v Brown*, 441 US 281, 301; 99 S Ct 1705; 60 L Ed 2d 208 (1979); *Dorr v United States*, 195 US 138, 146; 24 S Ct 808; 49 L Ed 2d 128 (1904). The District Court properly determined that the BOP designators at most exercise discretion of the type found in driving an automobile on an officiál mission, as to which this Honorable Court has already expressed itself:

> "Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy."

United States v Gaubert, supra, 499 US at 325 n. 7.

2. Plaintiff is entitled to recover damages, without regard to the FTCA, based on a theory of constitutional tort.

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[21]The designator's testimony, which was that the only concerns within her bailiwick were "whether or not there was a judicial recommendation, if there was a detainer involved, the severity of the current offense, if there was violence, the length of sentence. Those are the policy issues I would consider," supports this finding.

A. Because Plaintiff's pleadings were filed *in propria persona* and never amended, they must be broadly construed to plead any cause of action cognizable on the facts.

Plaintiff has consistently maintained that his pleadings, which were filed *in propria persona* and which therefore, however "inartfully pleaded," are entitled to be broadly construed, *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976); *Haines v Kerner*, 404 US 519, 520-521; 92 S Ct 594; 30 L Ed 2d 652 (1972), embrace not only an FTCA theory but a constitutional tort theory. The duty which the District Court found the government negligently breached as to plaintiff Cohen is one owed, if not by virtue of statute, then directly under the Constitution. *Owens v Haas*, 601 F2d 1242, 1249 (CA 2, 1979), cert den 444 US 980; 100 S Ct 483; 62 L Ed 2d 407. The FTCA remedy is not exclusive for federal constitutional torts. *Carlson v Green*, 446 US 14, 19; 100 S Ct 1468; 64 L Ed 2d 15 (1980). Therefore, the judgment should have been affirmed on this alternate and independent ground (which was duly noted in plaintiff's brief to the Eleventh Circuit, pp. 19 and 26, and at oral argument, and never challenged by the government), or at least remanded to the district court for further findings. *Farmer v Brennan*, 511 US 825; 114 S Ct 1970; 128 L Ed 2d 811 (1994).

B. The Eleventh Circuit decision overlooks unchallenged evidence of violence in asserting that the District Court clearly erred in finding that the BOP failed to follow the Policy Statement.

The Eleventh Circuit opinion holds that the District Court clearly erred in its fact finding that the BOP failed to follow the Policy Statement in concluding that the designator omitted to enter a history of violence on the BOP-14. In so holding, the Eleventh Circuit ignored unchallenged evidence, in the Presentence Report, showing that Humberto Garcia, aside from his multiple convictions, had threatened to hire an assassin to kill a witness and had assaulted and battered his sister between the date of conviction and sentencing of his cocaine conviction. PS 5100.2, Sec. 9, p. 16, item #12, states:

> 12. History of Violence: . . . History of violence includes the individual's entire background of

> criminal violence, excluding current offense . . . defined according to the degree of the seriousness of the act which resulted in a conviction *or a finding of guilt.*

Garcia had full due process with respect to the accuracy of the information in his Presentence Report, so this information, although not relating to convictions, did reflect findings of guilt[22]. The District Court therefore had this additional record support for its factfindings, which are thus not clearly erroneous.

C. Plaintiff Cohen is in any event entitled to a remand on the issue of Humberto Garcia's citizenship status.

The Eleventh Circuit's opinion in this case of *Cohen v United States*, 151 F3d 1338 (CA 11, 1998) concludes with the assertion that Humberto Garcia's alienage was left indeterminate by the District Court, but that this omission is immaterial, on the theory that "the Program Statement provides that the BOP's regional director retains the discretion to assign an alien to the lowest security level." (Appendix 5, p. 13) That is not true.

The Program Statement provides that a deportable alien must be assigned no lower than Security Level 2, but may, with the approval of the Regional Director, be placed in SL-1. The Eleventh Circuit overlooked the key distinction between "SL-1" and "SL-1 Out". Garcia, notwithstanding his status as a deportable alien, could have been assigned to an SL-1 institution, but nothing in the Program Statement suggests the possibility of an "SL-1 Out" placement like FCI Jesup. Thus, Garcia could not have been placed in the same institution as William Cohen, and his improper assignment to FCI Jesup at "SL-1 Out" by the BOP was therefore both wrongful and a proximate cause of Cohen's injuries. Cohen, at a minimum, is entitled to a remand to the District Court for resolution of the factual issue of whether Garcia was an alien or a citizen.

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[22] As any person being sentenced, Garcia had both motive and opportunity to correct any errors in his Presentence Report during allocution, so the report should carry a presumption of accuracy as to such matters. *United States v Kelly*, *supra*.

CONCLUSION

Plaintiff-Appellant Cohen respectfully requests that this Honorable Court grant the petition for certiorari so as to resolve the important issues presented, specifically reserved for later decision in *United States v Muniz, supra*, on which there is a clear division of authority among the various circuits (with the decision in the case at bar representing a minority of one) and thereafter vacated the Eleventh Circuit's opinion while concomitantly reinstating the District Court's finding of liability (as against the principal appeal of the United States), and remand the cause to the Eleventh Circuit for adjudication of the cross-appeal previously filed by William Cohen.

Alternatively, Plaintiff prays that this Honorable Court exercise its error correcting power to peremptorily reverse the decision of the Eleventh Circuit on the basis of the principles established in *FDIC v Meyer, supra* as applied to Plaintiff's statutory cause of action as previously established in *Muniz, supra*.

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